

STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Honorable Cooper, P.J., and Griffin ad Borrello, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Supreme Court No. 126538

Plaintiff-Appellant,

vs.

MARIO CURVAN,

Defendant-Appellee and
Cross-Appellant.

MI Court of Appeals No. 242376
Lower Court No. 01-010083

DEFENDANT-APPELLEE'S BRIEF ON APPEAL

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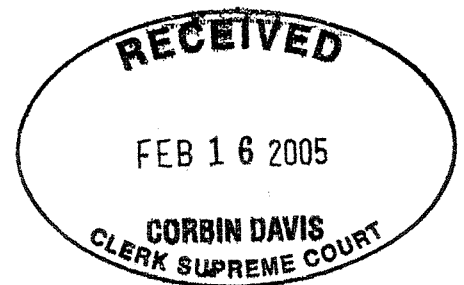


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STATEMENT OF JURISDICTION

Defendant-Appellee accepts the People's statement that this Court has jurisdiction over this case pursuant to the Order granting leave to appeal dated November 4, 2004. MCR 7.301(2).

COUNTER-STATEMENT OF QUESTIONS INVOLVED

- I. **WHETHER THE TRIAL COURT VIOLATED MR. CURVAN'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY UNDER THE UNITED STATES AND MICHIGAN CONSTITUTIONS, WHERE THE COURT SENTENCED MR. CURVAN FOR FIRST DEGREE FELONY MURDER AND THE UNDERLYING FELONY OF ARMED ROBBERY?**

The Michigan Court of Appeals answered "Yes".

Defendant-Appellee answers "Yes".

Plaintiff-Appellant would answer "No".

STATEMENT OF FACTS

Defendant-Appellee accepts the statement of material facts and proceedings as set forth in Plaintiff-Appellant's Brief on Appeal, except to the extent that it states any arguments or conclusions regarding the issue involved. Where appropriate, additional and/or counter-facts will be added to the argument section, *infra*.

ARGUMENT

THE TRIAL COURT VIOLATED MR. CURVAN'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY UNDER THE UNITED STATES AND MICHIGAN CONSTITUTIONS, WHERE THE COURT SENTENCED MR. CURVAN FOR FIRST DEGREE FELONY MURDER AND THE UNDERLYING FELONY OF ARMED ROBBERY.

ISSUE PRESERVATION AND STANDARD OF REVIEW:

Double jeopardy clause issues are preserved for appellate review without the necessity of an objection in the trial court, "because a significant constitutional question is presented." *People v. Passeno*, 191 Mich. App. 91 (1992). Defendant-Appellee accepts the People's statement that a double jeopardy issue involves a question of law, and therefore it is reviewed *de novo*. *People v. Lugo*, 214 Mich. App. 699 (1995); *People v. Price*, 214 Mich. App. 538 (1995).

ARGUMENT:

Mr. Curvan was charged in an information with two counts: first-degree felony murder and armed robbery. Mr. Curvan was convicted as charged. (111a). The armed robbery charge formed the basis for the felony murder conviction. In the original brief on appeal, Mr. Curvan argued that the armed robbery conviction and sentence must be vacated because it violated the Double Jeopardy provision of the United States and Michigan Constitutions. U.S. Const. Ams. V, XIV; Mich. Const. 1963, Art I, § 15. *See People v. Harding*, 443 Mich. 693 (1993); *See also People v. Gimotty*, 216 Mich. App. 254 (1996).

In their brief on appeal, the People disagreed and cited to then Chief Justice Corrigan's concurrence in *People v. Colvin*, 467 Mich. 944 (2003). The *Colvin* Court vacated the defendant's armed robbery conviction in accordance with the double jeopardy principles set forth in *People v. Wilder*, 411 Mich. 328 (1981). Concurring in the relief, Justice Corrigan opined that the *Wilder* decision should be re-evaluated to determine (1) why Michigan Courts analyze

double jeopardy issues differently than federal courts, even though identical constitutional provisions are in place and (2) whether the rationale behind the *Wilder* decision has been undermined by the Michigan Supreme Court's recent overhaul of lesser included offense jurisprudence. It was the prosecutor's position on appeal and in the application for leave to appeal to this Court that the federal test enunciated in *Blockburger v. United States* 284 U.S. 299 (1932) controls, and both convictions for felony murder and the underlying felony of armed robbery entered against Mr. Curvan should stand. The People have argued at length in their brief on appeal to this Court that the issue is far more complex and ultimately that the intent of the legislature controls when analyzing multiple **punishment** cases such as this. (People's Brief on Appeal at pages 15-16). Defendant-Appellee agrees, but arrives at a different conclusion on these facts than the People.

This Court recently determined that the *Blockburger* test is appropriate for analyzing alleged double jeopardy violations in the context of multiple **prosecutions**. *People v. Nutt*, 469 Mich. 565 (2004). In footnote 11, the majority was clear to distinguish the analysis from those involving double jeopardy allegations for multiple **punishments**, citing *Colvin, supra*.

In light of that decision, the Michigan Court of Appeals formally granted Mr. Curvan's request to offer supplemental authority in light of the *Nutt* decision. The Michigan Court of Appeals ultimately agreed with Defendant-Appellee on the double jeopardy issue ordered that his conviction and sentence for armed robbery be vacated. (3a-4a). This Court then granted leave to appeal to the prosecutor to fully develop the issue. (5a).

As stated above, this Court distinguished the *Nutt* decision from *Colvin* as focusing on multiple **prosecutions** as opposed to multiple **punishments**. It is clear from the footnote that the analysis had no effect on multiple punishment jurisprudence as it currently stands. Therefore, it

appears that the question left for this Court to consider is whether the holding of *Wilder* should remain in tact assuming a complete adoption of the federally based *Blockburger* test for analyzing all double jeopardy claims.

The Double Jeopardy provisions of both the United States and Michigan Constitutions protect a person from being twice placed in jeopardy for the same offense. U.S. Const. Am V, Mich. Const. 1963, Art. I, §15. These clauses protect a criminal defendant from both multiple punishments and multiple prosecutions. *People v. Torres*, 452 Mich. 43, 64 (1996) (additional citations omitted). For purposes of analyzing claims of double jeopardy arising out of multiple **prosecutions**, both Michigan and Federal Courts focus on the statutory elements of the offense. If each requires proof of a fact that the other does not, double jeopardy principles do not bar multiple prosecutions. *Nutt, supra*; *Blockburger, supra*. In the multiple **punishment** context, the Double Jeopardy clause of the Fifth Amendment to the United States Constitution prevents the sentencing court from imposing a greater punishment than the legislature intended. *Missouri v. Hunter*, 459 U.S. 359, 366 (1983). According to the United States Supreme Court, *Blockburger* is a rule of statutory construction - if the legislature intended to impose multiple punishments, then imposition of such sentences does not violate the Constitution. *Missouri v. Hunter, supra* at 367-368 citing *Albernaz v. United States*, 450 U.S. 333, 344 (1981).

In *Nutt, supra*, this Court noted that this state's jurisprudence strayed from a traditional federal analysis (detailed in the 1932 decision of *Blockburger, supra*) in double jeopardy cases after the 1973 decision in *People v. White*, 390 Mich. 245. The *White* Court opted for a "same transaction" test to determine whether the principles of double jeopardy were violated in the multiple **prosecution** context (as opposed to the "same offense" approach contemplated by the *Blockburger* decision, focusing on the elements, not the time, of the crime). *White* and its progeny

were overruled by this Court in *Nutt, supra*, as conflicting with the plain language of the Michigan Constitution. Michigan now employs the federal model to analyze the elements of the crimes involved in multiple **prosecutions**. *Nutt, supra*.

The now overruled *White* decision never greatly impacted multiple **punishment** cases. To the contrary, Michigan looked to federal courts for guidance in interpreting double jeopardy implications on multiple punishments for the “same offense”. *People v. Wilder*, 411 Mich. 328, 349 n.10 (1981). The *Wilder* Court held that one cannot be convicted and sentenced for both felony murder and the underlying felony of armed robbery, where the commission of armed robbery was an element of felony murder. *Id.* at 346. This decision was determined by the *Wilder* Court to be in line with federal authority. *Id.* at 348-349. However, the Michigan Supreme Court went on to note that our state constitution afforded a broader protection than the federal model defined in *Blockburger*. *Id.* The *Wilder* Court recognized that a review of the actual evidence at trial might determine whether double jeopardy principles were violated, instead of focusing solely on theoretical elements of the offense. *Id.* Furthermore, the *Wilder* Court recognized the concept that a cognate lesser offense could form the basis of a felony to support a felony murder conviction, not simply necessarily lesser included offenses. *Id.*

The second portion of the rationale distinguishing the *Blockburger* holding from *Wilder* is clearly no longer viable in light of *People v. Cornell*, 466 Mich. 335 (2002) (finding instructions on cognate offenses are no longer appropriate in Michigan). But portions of the *Wilder* decision remain valid. Michigan has historically recognized itself as offering its citizens broader protection from double jeopardy than the federal constitution. *See generally People v. Mackle*, 241 Mich. App. 583, 593 (2000). In any event, the instant convictions for felony murder and armed robbery clearly withstand scrutiny even under a strict *Blockburger* analysis which implicitly recognizes that

the intent of the legislature ultimately controls the issue. *Blockburger*, *supra* at 303-304. *See also Whalen v. United States*, 445 U.S. 684 (1980) (“the *only* function the Double Jeopardy Clause serves in cases challenging multiple punishments is to prevent the prosecutor from bringing more charges, and the sentencing court from imposing greater punishments, than the Legislative Branch intended.” Blackmun, J., concurring) (emphasis in original).

Michigan’s felony murder statute provides, in relevant part, that one is guilty of first degree murder if he or she commits murder “in the perpetration of, or attempt to perpetrate, arson, criminal sexual conduct in the first, second, or third degree, child abuse in the first degree, a major controlled substance offense, **robbery**, carjacking, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion or kidnapping.” M.C.L. §750.316(1)(b) (emphasis added).¹ Though the prosecutor stated in his application for leave to appeal that the crimes of armed robbery and felony murder are different for purposes of satisfying the *Blockburger* test (where armed robbery never requires proof of murder) the fact of the matter is that first degree felony murder cannot be committed without an armed robbery (in this case), so the *Blockburger* test is *not* satisfied here. There is ample support for this proposition from the United States Supreme Court. *See Harris v. Oklahoma*, 433 U.S. 682 (1977).

Analyzing Mr. Curvan’s case under the *Blockburger* and *Wilder* approach suggests the legislature did not authorize cumulative sentences for robbery and a murder committed during the course of a robbery. It is plainly not the case that each crime charged requires proof of an additional fact which the other does not – a conviction for murder committed in the course of armed robbery cannot occur without proving all the elements of the offense of armed robbery.

¹ This was the language of the statute at the time of Mr. Curvan’s trial. The legislature has since amended the statute to specifically enumerate the felony of vulnerable adult abuse in the first or second degree to support a first degree murder conviction effective June 11, 2004.

And while it may be theoretically true that not every felony murder charge will require specific proof of armed robbery, this distinction becomes nonsensical when considered in the context of any particular case. *See generally, Whalen, supra*, at 694; *Harris v. Oklahoma, supra*, at 683 (observing that where “conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime, after conviction of the greater one.”).² Accordingly, since armed robbery and felony-murder constitute the “same offense” under the *Blockburger* and *Wilder* approach, this Court must Mr. Curvan’s multiple convictions as a matter of law.

Michigan Courts analyze the multiple punishment strand of double jeopardy cases by examining the intent of the legislature. *People v. Calloway*, 469 Mich. 448 (2003). Thus, where the legislature expresses a clear indication of its intent to impose multiple punishments for the same offense, no double jeopardy violation will be found. *People v. Mitchell*, 456 Mich. 693, 696 (1998) (observing that “where a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger*, a court's task of statutory construction is at an end.”).

The primary goal of statutory construction is to ascertain and give effect to the intent of the legislature. *People v. Morison*, 471 Mich. 248, 255 (2004). The most relevant starting point for discerning legislative intent lies in the plain language of the statutes in question. The words contained in the statute itself contain the most reliable source of the Legislature’s intent. *Shinholster v. Annapolis Hosp.*, 471 Mich. 540, 548 (2004).

² And though *Harris* involved the multiple prosecution strand of double jeopardy analysis, the principle remains the same: first degree felony murder cannot occur without an underlying felony.

The statutes involved in this case suggest the legislature did not intend to impose cumulative punishments for first-degree felony murder and armed robbery. Michigan's armed robbery statute provides that any person who commits a robbery and "in the course of engaging in that conduct, possesses a dangerous weapon ... is guilty of a felony punishable by imprisonment for life or for any term of years." M.C.L. § 750.529. Michigan's felony murder statute provides that a person is guilty of first degree felony murder if he commits murder "in the perpetration of, or attempt to perpetrate, arson, criminal sexual conduct ... child abuse in the first degree, a major controlled substance offense, robbery, carjacking, breaking and entering of a dwelling, home invasion ... larceny of any kind, extortion, kidnapping, or vulnerable adult abuse." M.C.L. § 750.316 (emphasis supplied). Although non-felony murder and robbery undoubtedly constitute separate crimes, under the felony-murder statute, the two comprise one offense and must be considered together.

Under the unambiguous terms of the felony-murder statute, a conviction for murder in the course of one of the enumerated felonies cannot stand without proving all the elements of the underlying felony; the felony serves as a necessary predicate for a conviction on the greater offense of first degree murder. Significantly, the statute is devoid of language indicating an intent on the legislature's part to permit punishment for both the homicide and the underlying felony. If in fact the Legislature intended separate punishment for the two crimes, it could have reflected this view by amending the felony-murder statute after this Court abrogated Michigan's felony-murder rule in *People v. Aaron*, 409 Mich. 672 (1980). The legislature could have revised the murder statute to provide for multiple punishments by allowing a sentence for the associated felony to run consecutively to the sentence for felony murder, as is the case with a

felony-firearm conviction.³ Alternatively, the legislature could have chosen to eliminate the felony murder rule altogether, making it such that a defendant could be tried and convicted for both robbery and second-degree murder; such a course would preclude the risk that the prosecution could lose one of its convictions altogether under a successful double jeopardy challenge. Notwithstanding the various avenues open to it in this regard, the legislature declined the opportunity take such action in the 25 years since *Aaron* first questioned the felony-murder doctrine. The Legislature has also not acted since this Court decided the square issue presented in *Wilder, supra* in 1981. This strongly suggests the lack of legislative intent to allow cumulative punishment for both crimes.

Both Michigan and federal courts have consistently held that the legislature did not intend to impose punishments for both felony murder and the underlying felony. *People v. Harding*, 443 Mich. 693, 711 (1993); *Harris v. Oklahoma, supra* (observing that when conviction of a greater crime cannot be had without conviction of the lesser crime, the Double Jeopardy Clause bars prosecution for the lesser crime, after conviction on the greater).

Typically, where the Legislature manifests its intent clearly in the language of a statute, that statute must be enforced as written, free of any contrary judicial gloss, and “all words and phrases shall be construed and understood according to the common and approved usage of the language.” M.C.L. §8.3(a). In this case, an interpretation of the plain words of the statute makes it clear the legislature did not intend cumulative punishments. However, even if the Court

³ The legislature has also provided for multiple punishment through the mechanism of consecutive sentencing in cases involving prison escape, MCL 768.7a(1); parole violations, MCL 768.7a(2); major controlled substance offenses, MCL 768.7b(b); and, as noted above, felony-firearm, MCL 750.227(b). *See generally, People v. Chambers*, 430 Mich. 217 (1988) (“The purpose of consecutive sentencing is to ‘enhance the punishment imposed upon those who have been found guilty of more serious crimes and who repeatedly engage in criminal acts.’”)

considers other evidence of the legislature's intent, Mr. Curvan's dual convictions for both felony-murder and the underlying felony still cannot withstand scrutiny.

As additional methods of discerning legislative intent, a court may look to the subject, language and history of the statutes, the social norms protected by the respective statutes,⁴ the amount of punishment authorized by each and any other factors indicative of legislative intent. *People v. Robideau*, 419 Mich. 458, 487-488 (1984). Both armed robbery and felony murder find their origins in the common law. While the early justifications for the felony-murder rule has been fiercely scrutinized by state and federal courts, this Court has construed its purpose as providing harsher punishment for one who commits a murder in the course of committing a felony: "the societal norm could not be more clear – felony murder is second-degree murder that has been elevated to first-degree by the fact that it was committed during the commission of a felony." *People v. Harding*, 443 Mich. 693, 710 at n.18 (1993).

Moreover, commentary from a 1999 Michigan Senate Fiscal Agency Bill Analysis is instructive on this point. In advocating that carjacking should be added to the list of enumerated crimes under the statutory felony-murder rule, the document characterized the goal as ensuring a murder committed during a violent carjacking "could be treated as severely as possible under the law." *Michigan Senate Fiscal Agency Bill Analysis, Senate Bill 430* (May 3, 1999). Finally, in distinguishing the statutory version of felony-murder from the approach set forth in the common law, the document noted, "the penal code ... raises an already *established* murder to the first-

⁴ While robbery and murder charges arguably protect divergent societal norms, this fact is not dispositive.

degree level for the purpose of elevating the *punishment* that may be imposed.” (emphasis in original).

The legislature’s intent to avoid multiple punishments becomes even more clear when comparing the penalties available for each offense. Michigan’s armed robbery statute carries a penalty of either life imprisonment or any term of years. M.C.L. §750.530. By contrast, first-degree felony murder carries a punishment of mandatory life imprisonment, which by virtue of M.C.L. §791.234(6), contains no possibility of parole. M.C.L. §750.316. Including robbery as an enumerated crime under the felony-murder statute assures that if the elements of robbery are established at trial, the defendant will receive the harshest punishment available under Michigan law. Where one statute incorporates most of the elements of a base statute and then increases the penalty as compared to the base statute, it is evidence that the legislature did not intend punishment under both statutes. *People v. Denio*, 454 Mich. 691, 708-709 (1997), quoting *Robideau, supra* (noting that in such an instance, “the Legislature has taken conduct from the base statute, decided that aggravating conduct deserves additional punishment, and imposed it accordingly, instead of imposing dual convictions.”).

The felony-murder statute is devoid of any express intent to create more than a single crime or punishment. To the extent the legislative intent is not entirely free from doubt, that doubt must be resolved in the favor of lenity. *Wilder, supra* at 343.

Whether this Court applies a strict *Blockburger* test or some other mode of analysis, the ultimate determination about whether two crimes constitute one offense for multiple punishment double jeopardy analysis turns on the intent of the Michigan legislature. Because the legislature did not clearly express an intent to punish the two offenses separately, the rule of lenity requires that Mr. Curvan’s dual sentences be vacated. Any conclusion by this Court that Mr. Curvan’s

armed robbery conviction must be vacated is well grounded in both federal and Michigan case law. Even if the *Wilder* is eventually re-evaluated by this Court, the essential holding of *Wilder* remains sound. Accordingly, Mr. Curvan's conviction and sentence for armed robbery must be reversed.⁵

⁵ The net effect of this result, of course, is that Mr. Curvan will continue to serve a term of life in prison without the possibility of parole. Regardless, Defendant-Appellee maintains in this appeal that he, like all criminal defendants, is entitled to be sentenced on accurate information and within the parameters of the due process and double jeopardy clauses of the United States and Michigan Constitutions. *Townsend v. Burke*, 334 U.S. 736 (1971).

RELIEF REQUESTED

For all of the reasons stated herein, Defendant-Appellee respectfully requests that this Court AFFIRM the Michigan Court of Appeals' decision to vacate Mr. Curvan's sentence for the underlying felony of armed robbery.

Respectfully submitted,

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